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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of *Certiorari* to the Supreme Court of New Jersey

BRIEF OF *AMICI CURIAE*, ROLAND POOL AND MICHAEL GELLER, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Roland Pool and Michael Geller ("*amici*") have a unique perspective and knowledge about this dispute. Mr. Pool and Mr. Geller are Eagle Scouts with vast Scouting experience.[2] The Boy Scouts of America (the "BSA") and its National Capital Area Council ("NCAC") excluded each of them from Scouting the moment the BSA learned that he is homosexual. *Amici* brought a proceeding before the District of Columbia Commission on Human Rights for violations of the District of Columbia Human Rights Act. D.C. Code § 1-2501, *et seq.* (the "DCHRA"), *compare with* N.J. Rev. Stat. § 10:5-1, *et seq.* (the "LAD"). And in that proceeding, the parties presented 12 days of testimony and scores of exhibits, including all the evidence that the BSA could muster to show a factual basis for the Constitutional defenses it asserts here.

Amici believe that Petitioners' (collectively the Boy Scouts') brief seriously misportrays this dispute, the policy

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[1] Letters from Petitioners and Respondent consenting to the filing of this brief are on file with the Clerk's Office. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part.

[2] Roland Pool was a vulcanologist at the Smithsonian until 1997, when he left for divinity school, where he is currently studying to become a Quaker minister. In addition to being an Eagle Scout, he is a Vigil Honor member of the Order of the Arrow, a former assistant Scoutmaster, a leader of several troops to Boy Scout national jamborees, and for five summers a paid employee of the Boy Scouts at its Philmont Scout Ranch, the world's largest privately-owned wilderness. At Philmont, he rose from ranger to Assistant Director of Conservation, and was the author of a chapter of the Philmont Field Guide. Michael Geller, who is currently an employee of the World Bank, became a Boy Scout on his eleventh birthday, the first day he could join. Not only is he an Eagle Scout, and a member of the Order of the Arrow, two of Mr. Geller's uncles were Eagle Scouts. His father is a Life Scout who in 1997 celebrated 55 years in Scouting. Michael Geller's brother, David, is also an Eagle Scout, as are his three cousins.

at issue in this case, who created the policy, and how it is imposed. As explained below, when the facts are reviewed, it is apparent that there is no grave Constitutional question.

STATEMENT OF THE CASE

Amici adopt Respondent's statement of the facts of the case. *See also Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200-05 (N.J. 1999), *cert. granted*, 68 U.S.L.W. 3458 (US. 2000).[3]

SUMMARY OF ARGUMENT

Amici file this brief to make three points:

1. This case is *not* about anything that has ever been basic to Scouting or the reasons why the Boy Scouts' members came together. This case is not about *expression*. The BSA will *exclude* a homosexual who never intends to say anything about homosexuality—even a priest who preaches that homosexual conduct is *wrong*. But the Boy Scouts have welcomed self-avowed "advocates" for any number of causes—including those who urge that homosexuality *is* moral—so long as they *are* heterosexual.

Moreover, this case is not about the *Boy Scouts' expression*. Even the BSA's executives concede that making any statement concerning homosexuality forms no part of

[3] *Amici* have also lodged with the Clerk documents from the Commission's proceedings in order "to call the Court's attention to official documents not in the record that shed light on the arguments in [this] case." Robert L. Stern et al., Supreme Court Practice 556 (7th ed. 1993). These include excerpts from Boy Scout publications and the sworn testimony of Scouters—including two 30(b)(6) witnesses chosen by the Boy Scouts (Scott Teare and Marcus Mack), the BSA's former President, Richard Leet, and its Scout Executive for the NCAC, Ron Carroll, as well as other experienced Scouters called by the BSA and *amici*. *See Amici's Lodging* ("AL") Table of Contents (identifying the witnesses and documents). *Amici* request that this Court take judicial notice of these documents. *See, e.g., Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 567 n.8 (1974).

what Scouting seeks to do, nor of the Boy Scouts' charter, bylaws, program, literature, recruitment, fundraising or even private conversations. Indeed, (1) Scouters (meaning the over one million adult members and former members) with even 50 years of experience had never heard there was such a policy until the BSA had a public relations agency draft statements attempting to defend it; (2) the policy is articulated only in public relations statements and legal briefs; and (3) the policy is so incoherent and inconsistent with the program and purposes that are found in the Boy Scouts' literature that it could not possibly be a basis upon which the Boy Scouts' membership has come together.

2. This case is not about what a Boy Scout *Troop* can do. No troop decided to exclude James Dale or *amici* from Scouting; none has been ordered to do *anything* in this case. As Richard Leet, a former BSA President testified in *amici*'s proceeding, for purposes of this policy, "a troop is not a policymaking unit." This is a national policy, imposed over many troops' express objection, by an organization that bills itself as "the largest youth movement the world has ever seen."

3. Because of these circumstances, this case does not present any reason for the Court to reassess the framework it erected in the *Robert* trilogy—*Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *New York State Club Ass'n v. New York*, 487 U.S. 1 (1988). These cases impose no difficult burden on organizations like the Boy Scouts. If this case actually involved a matter for which its members had come together, the BSA would not have any problem showing this to be true. When, however, an organization that has had every chance to support the premise that its members have come together to express a particular message is reduced to relying on its own say-so to support that assertion, courts are not bound to accept it.

ARGUMENT

I. THE EXCLUSION OF HOMOSEXUALS FROM SCOUTING IS A PURELY IDENTITY-BASED DISCRIMINATION THAT CONTRADICTS, RATHER THAN REFLECTS, THE WELL-EXPRESSED PURPOSES THAT BRING MEMBERS OF THE BOY SCOUTS TOGETHER.

When the BSA frames the question in this case "Does state law requiring Boy Scout troops to appoint an avowed homosexual activist as assistant scoutmaster . . . abridge First Amendment rights of freedom of speech and freedom of association," it misstates the issue. As discussed in this section, New Jersey has not overturned a Boy Scout policy aimed at "avowed homosexual activist[s]"; the policy has nothing to do with avowal or activism. As discussed in Part II below, this case does not frame the issue of whether a "Boy Scout *troop*" is required to appoint anyone; this case involves a *national* policy imposed by a huge organization on troops, many of whom actively disagree with it, and none of whom ever chose to exclude James Dale.

A. The Policy At Issue In This Case Is An Identity-Based Exclusion That Has Nothing To Do With Expression.

Although the BSA strains to suggest that it carries out an exclusion based upon activism or expression, in fact, its exclusion has nothing to do with either. Far from singling out those with pro-gay views or a pattern of activism, the BSA excludes *anyone* who it learns is homosexual. "[T]he Boy Scouts of America does not accept homosexuals as members or leaders." AL 515 (Issues and Crisis Communications Guide) ("ICC Guide"); *see also* J.A. 453-59. In the words the BSA wrote when it told James Dale to sever all ties he had with Scouting, BSA policies "forbid membership to homosexuals." J.A. 137. The Boy Scouts similarly told *amicus* Roland Pool

that "[t]he policy" is "that the Boy Scouts of America does not accept homosexuals as youth leaders." AL 580.

The BSA does not ask or care whether someone who is homosexual intends to make sexual orientation an issue of any sort. AL 278 (BSA District-level professional Azzie Mae Hill). As Scout Executive Ron Carroll explained, the BSA will exclude someone who was compelled by legal process to reveal his or her sexual orientation, even if s/he swears never even to think of mentioning such personal information in any other context. AL 107, 251. The BSA would exclude a homosexual Catholic Priest who, on a daily basis, advocates the position that homosexual conduct is *contrary* to his religion. AL 140-43 (testimony of BSA witness Father Hummel).

As James Kay, who decided to exclude James Dale, testified, once an individual is identified as a homosexual, there is no information that person could give the BSA that would allow the application to be accepted. AL 305. The BSA told James Dale and *amici* that any attempt to provide information would be futile. *See, e.g.*, AL 580. Scott Teare, one of the BSA's chosen 30(b)(6) representatives in *amici*'s proceeding, said the rule is simple: "There should be no ifs, ands, or buts." AL 395.

On the other hand, if someone is heterosexual, expression by itself is *not* a reason for exclusion. The BSA does not exclude heterosexuals who believe that homosexuality is moral, even if they publicly avow this belief by marching in a gay and lesbian rights parade. AL 126-29 (BSA witness John Thomas); AL 383-84 (Teare); AL 358-62 (Marcus Mack; also BSA (30(b)(6) witness); AL 309-10 (Kay); or pass (AL 576) and publicize (AL 577) a resolution denying that homosexuality is immoral.[4]

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[4] The blanket exclusion of homosexuals also does not reflect any general code of conduct. The BSA will exclude homosexuals even if they are celibate. AL 109-10 (Carroll); AL 375 (Teare); AL

Nor (so long as the activist is heterosexual) do the Boy Scouts have any rule against associating with activists, who in their daily lives *do* promote views that would be inappropriate in Scouting. Although the Boy Scouts have no official position on abortion, they will admit those known to perform abortions and those who call it "murder." Although the Boy Scouts embrace no political party, AL 312 (Kay), they will welcome active Democrats, Republicans and Independents. The Boy Scouts ascribe to no particular religion, but will accept the evangelical who in other contexts, seeks converts, as well as those who would find such conversion to be contrary to their religions. AL 135-39 (BSA witness Rev. Turner). The BSA does not generally fear being associated with activists'

345-46 (Mack); AL 277-78, 291-92 (Hill). "If a homosexual rabbi wants to join the Boy Scouts, he would not qualify as a member based on that he does not live a morally straight life." AL 345 (Mack). But the BSA neither has a general policy of excluding heterosexuals who engage in adultery or premarital sex, nor does it generally police their sexual conduct. AL 380-82 (Teare); AL 281-83 (Hill); AL 243-48 (Carroll). Indeed, the BSA actively markets Scouting to *non*-traditional families—such as inner city, single-parent families, including those with unwed parents. *See, e.g.*, AL 518-537 (Marketing to Today's Families: Guide for District Scouters); AL 567 (Cub Scout Leader Basic Training Home-Study Workbook (1988 prtg.)); AL 415 (Official Scoutmaster Handbook 7th ed.); AL 151-54 (former BSA Executive Board member and National Explorer President Charles Wolfe), 204-05 (Leet). Thus, Mr. Kay testified that he was unaware of any BSA "policy concerning any other sexual practices, other than homosexuality" or "of anyone having their membership revoked under the standard of 'morally straight' who wasn't a homosexual." AL 307.

Also, contrary to suggestions of one of the *amici* filing on its behalf, the BSA does not maintain that the policy of excluding homosexuals exists to serve or does serve any end of avoiding child sexual abuse. The Boy Scouts recognize that the two issues are "not related," AL 511, 513 (ICC Guide); AL 390-91 (Teare), and train Scouters to avoid the mistake of acting on the "myth" that "children are at greater risk of sexual victimization from 'gay' (homosexual) adults than from 'straight' (heterosexual) adults." AL 558 (BSA, Youth Protection Guidelines (1987)).

different messages, or presume that all activists will use Scouting as a bully pulpit. But the BSA excludes all homosexuals regardless of whether they are "activists."

B. It Is No Part Of The Scouting Program To Say Anything About The Morality Of Sexual Orientation.

1. *The Boy Scouts Are Chartered To Be Inclusive, Not Exclusive.*

It is not surprising that the Boy Scouts openly embrace members with such disparate views. In 1916, six years after it was founded, the BSA received a Congressional charter "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U.S.C. § 23 (1916). As the BSA recognizes, "[o]ur federal charter sets forth our obligation to serve boys." AL 552 (BSA, A Representative Membership (1986 prtg.)). Thus, the BSA is inclusive:

> *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that Scouting should be made available for *all* boys who meet entrance age requirements. [*Id.* (emphasis added).]

Similarly, the most salient point about the Boy Scouts' view of religions is its inclusiveness. The Boy Scouts are required by their bylaws to be "absolutely nonsectarian," J.A. 362; they inform adults of this on every application. AL 597. The Boy Scouts do not define what constitutes a belief in God and have always left religious training up to parents and religious leaders. *See, e.g.*, AL 583 (BSA, Advancement Guidelines (1992)); AL 437 (BS Hbk.

2d [5]); ("If he be a Catholic boy scout, the Catholic Church of which he is a member is the best channel for his training. If he be a Hebrew boy, then the Synagogue will train him in the faith of his fathers . . . ."); AL 347-48 (Mack); AL 392-93 (Teare).

Thus, "[t]he Boy Scout program conflicts with no religious doctrine." AL 406 (SM Hbk. 3d); *see also* AL 400-01 (SM Hbk. 1st). The Boy Scouts welcome not only Christians, Jews and Moslems, but Buddhists, Hindus, and those who are not members of *any* organized religion. AL 583 (Advancement Guidelines). As former Chief Scout Executive Ben Love put it, "I don't care if he worships the Great Turtle, you have to believe in something." AL 183-84, 185-86.

The Boy Scouts did not come together (or receive extensive governmental support, *imprimatur* and participation) for the purposes of expressing ideas that are not part of their charter or program, and, in fact, divide their vast membership. To the contrary, the BSA's bylaws, literature and principles do not permit it to pick and choose among the moral views of different religions or among the faithful within particular religions. AL 280 (Hill); AL 15-16, 17-19 (former District Commissioner Thornell Jones), 71-74 (former Assistant District Commissioner Dan Press). A Scout is told repeatedly to follow his parents and his religious leaders in being faithful to his own religion and that the failure to respect the religious beliefs of others is as contrary to the principles of Scouting as faithlessness in one's own religious beliefs, *see, e.g.*, J.A. 189, 216, 226. And the Boy Scouts repeat this pluralism again and again, *except* when the BSA tries to defend the policy at issue in this case.

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[5] "BS Hbk. nth" and SM Hbk. nth respectfully refer to the series of Boy Scout Handbooks and Scoutmaster Handbooks. The "nth" refers to the edition.

2. *Because Of These Tenets, It is Not And Never Has Been Any Part Of The Scouting Program To Discuss Homosexuality Or Its Morality.*

When the BSA concedes that "Boy Scouting does not convey an explicit 'anti-gay' message to the boys," Pet'r Br. at 21, it understates the facts. In fact:

It is no part of the Boy Scouts' program to teach any view concerning sexual orientation or its morality. AL 308 (Kay); AL 384 (Teare); AL 11-12, 28 (Jones).

The Boy Scouts do not discuss their policy of excluding homosexuals when they recruit either youth or adults to become members or organizations to become sponsors. J.A. 691, 753-54. As a Boy Scout professional put it when asked whether parents of prospective Scouts are told about the exclusion of homosexuals when they attend "Join Scouting Night" recruitment activities, "we don't ever bring that out." AL 284 (Hill); *see also* J.A. 104-05.

The policy of excluding homosexuals is not articulated at various Boy Scout events where Scouting values are discussed. AL 233-41 (Carroll). For example, the Boy Scouts do not discuss homosexuality or its morality at Scout meetings, at adult meetings, or at training sessions. *Id.* The Boy Scouts have Boards of Review for possible advancement in the ranks of Scouting, where Scout leaders meet with Scouts to discuss very thoroughly the Scout Oath, the Scout Law, and the Scout's efforts to live up to these ideals; but these never discuss the morality of homosexuality. J.A. 151-52.

The Boy Scouts do not mention the policy of excluding homosexuals when they train adult volunteers or youth. AL 11, 45-49 (Jones); AL 266-67 (Regional official Doug Fullman). If it does come up, it is in the context of telling Scout leaders not to mention homosexuality unless someone else brings it up. AL 279, 284-86, 287-90 (Hill).

The Boy Scouts' policy of excluding homosexuals is never mentioned as part of fundraising efforts. AL 31-32 (Jones), AL 103-04, 233-40 (Carroll), AL 147 (Wolfe).

3. *The BSA Policy Is Not Mentioned In The Vast Collection Of Materials By Which It Describes Its Values, Its Program Or Its Operations.*

Contrary to the impression the BSA seeks to leave in its brief, the Boy Scouts are not shy or subtle about expressing the values they exist to serve. "Few organizations have such an abundant reservoir of manuals, guidebooks, pamphlets and training tools available for their leaders as does the Boy Scouts of America." AL 602 (BSA, Commissioner Administration of Unit Service (1996)). The Boy Scouts routinely provide volunteer Scout leaders with policies on matters such as "two-deep leadership," aquatic safety, use of alcohol and tobacco, first aid, accommodating religious practices, national and council initiatives, recruitment, fundraising, program activities, camping, merit badge requirements, awards, uniforms, ceremonies and scores of others, and have detailed the aims, principles and methods of Scouting in tens of thousands of pages of material. AL 55-92 (Press).

Nor does the BSA usually hide its membership policies. When the Boy Scouts excluded women from leadership positions, they told Scoutmasters and troop committees about it in the training materials. *See* AL 562-63 (BSA, Scoutmastership Fundamentals (1987)). When the Boy Scouts speak of the requirement that individuals swear to uphold a duty to God, they speak of it "proudly" and cite bylaws and editions of the *Boy Scout Handbook*, old and new, to reflect that policy. *See, e.g.*, AL 595.

Statements about homosexuality, the Boy Scouts' views concerning it or even reference to its exclusionary policy, however, are not merely absent from the "[o]fficial Scouting materials addressed to the boys." Pet'r Br. at 5; *see also, eg.*, AL 428-29, 448-49, 451-57, 464-75, 477-83,

489-95, 498-503 (BS Hbks. 1st and 4th through 9th, respectively). They are absent from all *adult* materials too. *See, e.g.*, J.A. 691 ("policy [is not] contained in explicit language in any document that is disseminated to Scouts . . . [or] to parents of Scouts"); J.A. 188-89.

Moreover, even if one were to assume that, for purposes of excluding homosexuals, the Boy Scouts suddenly decided to be subtle about what values they sought to articulate, the Scouting literature does not even fairly imply such a policy. To the contrary, the Boy Scouts' program materials articulate, over and over again, principles of tolerance and deference to the diverse judgments of parents and religious leaders on issues of morality.

In the Scout Oath, for example, a Scout promises to do his best "[t]o do my duty to God." This duty, however, specifically means following one's own conscience on religion, and it is as important to respect the religious beliefs of others as to be true to one's own religion. As the *Scout Handbook* explains:

> Your family and religious leaders teach you to know and love God and the ways in which God can be served. As a Scout, you do your duty to God by following the wisdom *of those teaching in your daily life, and by respecting the rights of others to have their own religious beliefs.*

J.A. 216 (emphasis added); *see also, e.g.*, AL 420 (Bear Cub Scout Book); AL 423-24 (Wolf Cub Scout Book); AL 488, 495 (BS Hbk. 8th).

When the Scout Oath refers to doing a duty to "my country," Scouts are advised to "[h]elp keep the United States strong by obeying its laws." J.A. 216. As far back as 1915, the Boy Scouts told youth that obeying laws meant standing for "equal opportunity and justice":

> Good citizenship means to the boy scout not merely the doing of things which he ought to do when he

> becomes a man, such as voting, keeping the law, and paying his taxes . . . . It means that he will stand for the equal opportunity and justice which the Declaration of Independence and the Constitution guarantees. [AL 433 (BS Hbk. 2d)].

The Boy Scouts have repeated that message countless times since. *See, e.g.*, J.A. 56, 110; AL 445-46, 447 (BS Hbk. 4th); AL 459 (BS Hbk. 5th); AL 462 (BS Hbk. 6th); AL 411 (SM Hbk. 7th).

The Scout Oath says that a Scout is supposed "to help other people at all times." The *Scout Handbook* explains these words as follows:

> There are many people who need you. Your young shoulders can help them carry their burdens. A cheerful smile and a helping hand will make life easier for many who need assistance. By helping whenever aid is needed and by doing a Good Turn daily, you prove yourself a Scout. You are doing your part to make this a better world. [J.A. 217.]

The importance of the term "mentally awake" in the Scout Oath is that "[w]ith an open attitude and the willingness to ask questions, you will get the most out of your life." J.A. 218.

The *Scout Handbook* defines the words "morally straight" in the Scout Oath as follows:

> To be a person of strong character, guide your life with honesty, purity and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant. [*Id.*]

See also AL 20-21 (Jones); AL 488 (BS Hbk. 8th); AL 484 (BS Hbk. 7th) ("your conscience speaks to you about your relationships to other people—respecting their rights, treating them justly, giving them a fair chance.").

The first point of the Scout Law, "A Scout is Trustworthy," makes honesty part of a Scout's "code of conduct," and requires him *to be true to himself*. J.A. 219; AL 13 (Jones).

The third point of the Scout Law, "A Scout is Helpful," includes being concerned about other people and doing a good turn. J.A. 220-21; AL 13-14 (Jones).

The Boy Scouts describe the fourth point, "A Scout is Friendly," as follows:

> A Scout is Friendly—A Scout is a friend to all. He is a brother to other Scouts and to all the people of the world. *He seeks to understand others. He respects those with ideas and customs that are different from his own.*
>
> * * * *
>
> The moment you become a Scout, you join a brotherhood of friends that circles the world. Those in it are of different countries and colors and creeds, but they are all brother Scouts. *They live up to Scout Oaths and Laws just as you do.*
>
> Making a friend is fairly easy if you are friendly yourself. Keeping a friend is more difficult. Every person is an individual with his or her own ideas and ways of doing things. *To be a real friend you must accept other people as they are, show interest in them, and respect their differences.*
>
> Accept who *you* are too. You don't have to be just like everyone else. Real friends will respect the beliefs, interests, and skills that make you unique.

J.A. 221 (emphasis to first three paragraphs added).

In describing the sixth, seventh and tenth points of the Scout Law—"A Scout is Kind," "A Scout is Obedient," and "A Scout is Brave"—the Boy Scouts tell Scouts to "[t]ake time to listen to the thoughts of other people," to "[i]magine what it would be like if you were in someone else's place," J.A. 222; to be "kind to people you don't

know or don't understand, and to people with whom you disagree," because "compassion for all people is a good antidote to the poisons of hatred and violence," *id.*; to obey[] the laws of [your] community." J.A. 223; to "also trust your own beliefs and obey your conscience when you know you are right," *id.*; and to "do what is right in spite of what others might say." J.A. 225.

The Boy Scouts explain the eleventh point, "A Scout is Clean" as follows:

> Swear words, profanity and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults. [J.A. 226.]

The final point of the Scout Law, "A Scout is Reverent," reiterates the basic philosophy of being true to one's own religion and respectful of others. Again, in the Boy Scouts' words:

> The United States Constitution gives each of us complete freedom to believe and worship as we wish without fear of punishment. All your life you will encounter people who hold different religious beliefs or even none at all. It is your duty to respect and defend the rights of others whose beliefs may differ from yours. [*Id.*]

Accepting people who are different is not idle advice. "Scouting's aim is to . . . eradicate the prevailing narrow self-interest, personal, political, sectarian, and national, and to substitute for it a broader spirit of self-sacrifice and service in the cause of humanity; and thus to develop mutual goodwill and cooperation. . . ." AL 416 (SM Hbk. 7th) *See also, e.g.*, J.A. 56 ("The BSA endeavors to develop American citizens who . . . have a keen respect for the basic rights of all people . . . .") Through programs entitled "Ethics in Action" and "Youth Frontier," the Boy Scouts "directly respond" to their mission statement by "teaching today's young people how to apply the[] abstract ideas [of the Scout Oath and Scout Law] in everyday situations." AL 538-39. These programs use intensive exercises to teach Scouts that it is wrong to discriminate, that people must be treated as individuals and that differences among them should be celebrated. AL 541-48; AL 172-82; AL 590-91. Similarly, in "Learning for Life," the Boy Scouts go into public schools to teach students "Scouting values," AL 585 (NCAC 1992-93 Annual Report); AL 569 (BSA, BSA at a Glance), such as "the importance of respecting the rights of *all people*. . . ." AL 575 (BSA, Learning For Life: Sixth Grade 1991)) (emphasis in original).

Thus, while the Boy Scouts write briefs suggesting that it is contrary to Scouting values to associate with one group or another, they write manuals teaching that it is contary to Scouting values to associate with intolerance. In their programs, the Boy Scouts urge that if students "are surrounded by people who are prejudiced against others or intolerant of persons with differences, students will tend to reflect those prejudices." AL 575A; *see also* AL 203 (Leet).

4. *The Boy Scouts Do Not Express A Message For Or Against Homosexuality, Even In Private Conversations.*

"Scouting believes that boys should learn of sex and family life from their parents, consistent with their spiritual beliefs." AL 560-61 (Scoutmastership Fundamentals). Scoutmasters "do not undertake to instruct Scouts, in any formalized matter in the subject of sex and family life. The reasons are that it is not construed to be Scouting's responsibility, and [they] may not be qualified to do this." AL 414 (SM Hbk. 7th). In counseling Scouts, a Scoutmaster "absolutely refrains from giving advice,

even if it is asked for," or letting the Scout "know 'where [the Scoutmaster] stands.'" *Id.* at 414 (emphasis added). The Boy Scouts have told Scoutmasters that "[w]hat you consider moral or immoral depends on your upbringing and background." *Id.* at 412. Accordingly instead of dictating a particular morality, Scoutmasters look to see if a Scout displays "Courage about what he believes," "Respect for other people's viewpoints when they differ from his," "Compassion for others' feelings and needs," "Acting as if the rights of others matter to him," and "Accepting others as equal in worth and dignity." *Id.* at 412-13. At all times, Scoutmasters are to "respect the right of parents to teach their sons about life," and to "refer boys with sexual problems to persons qualified to handle them." *Id.* at 414.[6]

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[6] *See also, e.g.*, J.A. 211; J.A. 249; AL 427, 430 (BS Hbk. 1st); AL 433-38 (BS Hbk. 2d). Thus, contrary to the BSA's implication, Br. at 3, when handbooks tell Scouts "[t]alk with your . . . Scoutmaster," or, actually "[t]alk with *your parents, religious leaders, teachers*, or Scoutmaster," J.A. 211 (emphasis added), about problems and tell Scoutmasters to "[b]e very open and clear when talking to them," J.A. 249, they do *not* direct Scoutmasters to give Scouts *guidance* on sexual matters. The paragraph in the *Boy Scout Handbook* that precedes the one the BSA cites instructs Scouts that such guidance comes from other sources: "[y]our religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." J.A. 211. William Kirkner, who helped *author* the passage the BSA references, explained that it was never intended to address homosexuality. AL 164-71.

Similarly, the full passage from the *Scoutmaster Handbook* instructs Scoutmasters *not to* be the source of guidance on sexual issues: Rather they are to "[a]ccept all youth as they are . . . Your acceptance will reassure them that they are 'normal,'" and to "[b]e accepting of their concerns about sex." J.A. 248, 249. Nothing tells Scoutmasters that the words, "[a]ccept all youth as they are," are supposed to mean "expel any youth who is homosexual."

5. ***Because Of These Rules, The Boy Scouts Expect That Scouts And Their Parents Would Never Find Out That The Organization Had Any Policy Concerning Sexual Orientation.***

The BSA does not expect that Scouts or parents will ever learn that homosexuality violates a principle of Scouting. James Kay testified:

> Q: How would a prospective Boy Scout learn of the policy . . . concerning homosexuals, as set forth in the "POSITION STATEMENT"[?]
>
> * * * *
>
> A: If he became in violation—If he became in violation—If he were an avowed homosexual he would be informed of the policy. [AL 306.]

Indeed, Ron Carroll, the Scout Executive involved in *amici*'s exclusion from Scouting, added that even when the Scout is told that "you are excluded," the Scout is *still* not supposed to be told that the Boy Scouts believe homosexual conduct is immoral. AL 121-22.

6. ***It Is So Foreign To The Boy Scouts' Message To Say Anything About Homosexuality That Scouters With Decades Of Experience Had No Idea That The BSA Leadership Took Any Position Concerning The Morality Of Homosexuality, Or Its Appropriateness For Scouting, Until They Read About It In Newspapers.***

At *amici*'s hearing, the Boy Scouts could not locate *any* witness to testify that it is a goal of Scouting to condemn homosexuality, or that he was taught as part of his Scouting experience that homosexuality was wrong. In contrast, numerous witnesses attested that the issue of sexual orientation was never mentioned throughout their Scouting experience. *See, e.g.*, J.A. 153, 669. Indeed, several Scouters with 20, 30, 40 or even 50 years of membership were unaware of the policy until the 1990s, when they learned about it directly or indirectly through newspaper articles. *See, e.g.*, J.A. 623-29; J.A. 647-67.

None of them said that their experience informed them that Scouting conveyed some "subtle" pro-heterosexuality message.[7]

In short, if a Scout were to ask his parent or religious leader whether homosexual conduct is immoral, and the parent or religious leader said "no," there is nothing in the vast body of Scouting literature or practice that suggests that the Boy Scouts disagree with this answer, much less that the boy should disobey the dictates of his parents or religious leader. *See, e.g.*, AL 130-34 (Thomas); AL 506-07 (BS Hbk. 10th); AL 220-21 (Bond). And there is everything to contradict the notion that the Boy Scouts agree with Baptists, but not Episcopalians, or prefer the view of Orthodox over Reform Jews, or those of some Methodists over others. The Boy Scouts do not articulate any message on the morality of homosexuality. They urge Scouts to follow their *own* religious convictions.

[7] Thus, it is misleading for the BSA to declare that "[f]or most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality." Pet'r Br. at 5. Some states had laws (many long unenforced and repealed) against sodomy. But that does not show that *Boy Scouts existed for the purpose of promoting those laws* any more than the facts that, for many years, states also barred interracial marriage and women from voting or holding public office show that the Boy Scouts (or every other organization in existence at the time) existed to promote those causes. In any event, the words "[f]or most of Scouting's history," leaves the rest of Scouting history. The DCHRA has barred discrimination on the basis of sexual orientation since 1978. If the organization truly were formed for the purpose of expressing some view on homosexuality, it would have made this clear somewhere in recruitment, fundraising, training or program materials in the 22 years since.

C. The BSA's Policy Of Excluding Homosexuals Is So Incoherent, It Is Impossible to Reconcile The Prongs Of The Boy Scouts' Litigation Position Much Less Identify It As A Principle That Brings Its Members Together.

The BSA's policy of excluding homosexuals has several salient features: (1) the policy is stated not in program materials, but in public relations materials and briefs; (2) no one is able to articulate a consistent policy that reflects its ostensible purposes; and (3) the formulation ("known or avowed homosexuals") the BSA now uses to support its argument is so internally contradictory that it could not possibly be an expressive message that brought its members together.

1. *The BSA's Exclusion Policy And Its Purported Justifications Are Recent And Found Only In Public Relations Materials And Briefs.*

The BSA first stated a policy of excluding homosexuals in two 1978 internal memoranda. J.A. 451, 453-56. However, it was not until 1991 that it issued a public statement mentioning the policy. Even internally, for years, the BSA did not link the exclusion to the Scout Oath or the Scout Law or even suggest that it would attempt to apply the policy in places where laws barred discrimination on the basis of sexual orientation. J.A. 455 (1978 memorandum stating that policy would be applied "in the absence of law to the contrary," because "[i]n the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it"). As late as 1989, the Boy Scouts' official policy with respect to paid employees was to "offer equal employment opportunity . . . on the basis of qualifications and ability without regard to race, color, national origin, sex, age, religion, handicap . . . *or any other criterion prohibited by applicable law.*" AL 619 (BSA Employment Policy (1989)) (emphasis added).

In the early 1990s, however, *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998), went to trial, and the exclusion policy became a "significant focus of attention." AL 510 (ICC Guide); AL 370-72 (Teare). In response, the BSA developed a public relations strategy of arming its professionals with position statements, Q&As and media training materials so that they would know what to say *when asked* about the BSA's policy on homosexuals in Scouting. J.A. 453-61; AL 386-87 (Teare).

The goal of these position statements was public relations. They were not drafted by the BSA divisions that draft the manuals and guides for the Boy Scouts' programs. AL 367 (Teare). A public relations firm, Edelman Worldwide, drafted these statements with help from the BSA's public relations staff. AL 319, 321-22, 324, 327-28 (Lewis); AL 385, 388-89 (Teare); AL 208-09 (Leet). These statements were designed to deal with the problem that the BSA's position was not well understood in the media. AL 325-26 (Lewis). And they were coordinated through an Edelman employee, whom the BSA designated as its "national spokesperson." AL 368-69 (Teare); AL 316-18 (Lewis); AL 579 (Edelman Public Relations Worldwide Media Training Guide for BSA (1992)); AL 93 (BSA media training tape).

The public relations was defensive. The Boy Scouts did not want to discuss this policy unless the media pressed the issue. *See, e.g., id.* at 94-97; AL 512 (ICC Guide); AL 372 (Teare); AL 320 (Lewis). The BSA did not send these position statements to scoutmasters or other volunteers. The BSA sent them to its *professional Scout Executives*, AL 386 (Teare), and left the rank and file to learn of the policy (if at all) from articles that quoted the BSA's attempt to justify a policy volunteers could find in no manual. J.A. 662, 688; *see also, e.g.*, AL 22-45 (Jones), 148-50 (Wolfe).

2. No One Has Been Able To Articulate A Coherent Explanation Of The Policy The BSA Is Asking The Court To Find Constitutionally Essential To Its Operation.

Whatever merits these "position statements" may have for the BSA's public relations, they did not establish a coherent policy. When its witnesses were questioned, none could explain exactly what the BSA's policy is and why.

Do the Boy Scouts exclude every homosexual, or only "known and avowed" ones? In practice, the Boy Scouts exclude every homosexual no matter what they avow. This is how the BSA's "national spokesperson," Blake Lewis, understood the policy, AL 323 (Lewis), as did its top professional, Chief Scout Executive, Jere Ratcliffe. AL 587 (Ratcliffe Speech). And it is what the BSA said in the letters it used to expel Mr. Dale and *amici* from Scouting, *e.g.*, AL 580, and when it trained professional spokespersons. AL 515.

In fact (contrary to Pet'r Br. at 7), both the BSA's statements, *see, e.g.*, J.A. 455 (Q2), and several of its witnesses even confirm that the BSA will *investigate* the sexual orientation of adult and youth. *See, e.g.*, AL 349-55, 363 (Mack); *id.* 363 (policy of investigations applies to youth); AL 377-78 (Teare) (same). One professional noted that it "would have raised some questions in [his] eyes" to see that an applicant had volunteered at Washington, D.C.'s Whitman-Walker Clinic, because it "is a clinic that treats patients with AIDS. And I know that many of those patients are members of the gay community from what I have been given to understand." AL 222 (Bond). During *amici*'s hearing, the BSA's counsel sought to identify homosexual Scouters and conceded that the BSA would use that information to investigate them. AL 155-60.

But the BSA's supposedly authoritative position statements give conflicting answers about to whom the policy applies. Many say that the BSA excludes *homosexuals* without limitation. J.A. 457-59; *see also* J.A. 137. And

others refer to "avowed" homosexuals, J.A. 460-61; *see also, e.g.*, J.A. 138, 451, 552—not "*known or* avowed."

BSA's witnesses further confuse the situation. After being deposed, *every one* of the BSA's representatives filed *errata* materially changing his description of the policy to add "known or avowed" qualifications. AL 375-76, 380, 394, 396 (Teare); AL 345-46, 363 (Mack); AL 228-32, 252-57 (Carroll). And, at *amici*'s hearing, Scout Executive Carroll testified that although numerous statements (including his own letter) said that the BSA excluded all homosexuals, the BSA really meant "known or avowed" homosexuals. AL 108 (Carroll).

If "known or avowed" is the policy that has, for 90 years brought Boy Scout members together, what does it mean? For some BSA executives, it means nothing. They say that all the words "known or avowed" mean is that the BSA intends to exclude anyone who is a homosexual, but can only exclude the ones it knows about. *See, e.g.*, AL 333-37 (Mack); AL 218-19 (Bond); AL 249-50 (Carroll).[8]

For others, "known or avowed" means there is no problem with *being* homosexual, just with *saying* you are homosexual. For example, when asked if the BSA has "a problem with someone who is a closeted homosexal participating in Scouting," the BSA's witness said:

> So long as in front of the kids, the youth, the young members, that they are upholding the values and principles found in the Scout oath and law and they have come up to that level, we want them to come up to be a volunteer. But from the moment they say they are a homosexual, so now they are known or avowed, they can no longer present those values

[8] Of course, such a policy would be no defense. The Constitution does not afford special protection to defendants who declare that they are not really excluding Italians or Jews, but merely those they know or hear tell are Italians or Jews.

> to the children because of who they are, who they said they are.

AL 379-80 (Teare); *see also* AL 118-20 (Carroll); AL 275-76 (Hill) (it would not concern the BSA to think that an applicant was homosexual; only "if there was a confession of homosexuality"). Former BSA President Richard Leet testified that someone who engages in homosexual sex behind closed doors *can* "sincerely take the Scout Oath and Scout Law and be part of the Boy Scouts so far as the Boy Scouts is concerned," AL 206-07, as long as the person does not talk about it. Scout Executive Kay testified both ways. *Compare* AL 305 (he is not aware of "any circumstances under which it would be consistent with Boy Scouts' policy for a homosexual to be a member of Scouting") *with id.* at 310-11 (suggesting "known or avowed" means that someone who hides his homosexuality can be a member).

If, however, the BSA does not want homosexuals to be "known or avowed," it has an odd way of implementing it. Not only will the BSA *investigate* allegations of homosexuality, some of the same executives who testified that the BSA does not care about homosexuals so long as the person does not admit it also interpret the BSA's adult volunteer application to *ask* about sexual orientation. Question 6(e) on the application asks the applicant to identify and to "explain" whether there is anything that "call[s] into question [the applicant] being entrusted with the supervision, guidance and care of young people." These BSA professionals say that this question asks a homosexual person to *identify him/herself as a homosexual.* AL 373-75 (Teare); AL 111-17, 242 (Carroll); AL 337-44 (Mack); AL 216-17 (Bond).

Taken together, the BSA is asking the Court to conclude that its members, over a period of 90 years, came together for the shared purpose of implementing a policy as follows: *It is OK to be homosexual, just don't say that*

you are. But we do ask, even though we don't want to know. And you are supposed to tell us. But if you do tell us that makes you an advocate and we won't want to associate with you (although we will associate with heterosexuals who are admitted advocates). Small wonder the New Jersey Supreme Court had problems finding that the members in fact come together for such a purpose.

3. *The Version Of The Policy That The BSA Uses For Purposes Of Litigation Is Not Even Internally Consistent.*

Even the BSA's preferred version for purposes of litigation is incoherent. The BSA cannot simultaneously tell the Court that Scouting regards homosexual conduct as immoral, but that a homosexual who keeps his/her sex life private can "sincerely take the Scout Oath and Scout Law and be part of the Boy Scouts so far as the Boy Scouts is concerned." AL 206-07 (Leet). The reason a closeted homosexual can sincerely take the Scout Oath and Law is because the Scout Oath and Law do not make homosexuality immoral.

One of the principal messages the Boy Scouts give adult leaders is to "practice what you preach," because "[t]he most destructive influence on boys is adult inconsistency and hypocrisy." Pet'r Br. at 4 (quoting J.A. 257). The belief that homosexuality is only immoral if you are honest about it is not what "brought [the Boy Scouts' members] together." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Dishonesty is what, in any other context, Boy Scouts oppose. *Cf.* Point One of the Scout Law; AL 590 (Youth's Frontier: Making Ethical Decisions) ("[i]f you punish a child for being honest the child learns quickly not to do that again").

II. THIS CASE INVOLVES A NATIONAL POLICY IMPOSED BY "THE LARGEST YOUTH MOVEMENT THE WORLD HAS EVER SEEN," NOT THE DETERMINATIONS OF INDIVIDUAL TROOPS.

This case does not fairly frame the issue of whether a Boy Scout *troop* is required to admit anyone. No troop is a defendant; there is no order requiring any troop to accept Mr. Dale; no troop decided to exclude Mr. Dale or *amici*; and none is here claiming *its* rights were infringed. "Dale was informed *by higher Scouting authorities* that he was ineligible to serve as a Scout leader . . . ." Pet'r Br. at 9 (emphasis added). Not only would Mr. Geller's troop welcome him as an adult leader, the Board of the (Baden-Powell) council covering a multi-county region in which his troop was located *unanimously* passed a resolution *opposing* the BSA's national policy of excluding homosexuals. J.A. 644-46. Mr. Pool was trained as a unit commissioner, where he would not be with any troop, but report to an assistant district commissioner and district commissioner, *both of whom* testified on *his* behalf about why they wanted him.

More importantly, troops have no control over this decision. The BSA's exclusion of homosexuals from Scouting is a national policy, imposed on the nation. AL 101-02 (BSA training tape); AL 356-57 (Mack). "The BSA's position is unyielding." AL 515 (ICC Guide). "[E]xceptions to the national policies of the BSA [on this issue] are not granted," J.A. 460, even when troops actively oppose the policies. *See, e.g.*, J.A. 626-28, 638-46; AL 576-77 (troop resolution and publicity about it). As its former President Leet put it, "[y]*ou know, a Troop is not an organization that is part of a policymaking chain.*" AL 210 (emphasis added).

The BSA cannot bootstrap rights from the troops that it leaves out of its "policymaking chain." The Court should not declare a Constitutional principle on the *guess* that scores of troops, many sponsored by public organiza-

tions that are barred by the LAD from discriminating based upon sexual orientation or by religious groups that fervently oppose such discrimination, will *all* now decide to exclude Mr. Dale on that basis.[9]

Nor, of course, are the Boy Scouts as a whole an "intimate association." For purposes of its argument, the BSA portrays itself as if it were some sort of insular, distinctly private club, formed by a group of churches to promote religious programs that oppose homosexuality. In any other context (such as fundraising or seeking government support), however, the Boy Scouts would describe themselves as "the largest youth movement the world has ever seen." AL 463 (BS Hbk. 6th).[10]

The Boy Scouts believe that "Boy Scouting is for any boy who meets the age requirements and is willing to subscribe to the religious principles." AL 555 (Boy Scout Parent/Leader Orientation (1986)). It is a BSA priority to expand membership of both youths and adults. AL 193-94, 197-98 (Leet). When the BSA runs its major recruitment effort "Join Scouting Night" in public schools its goal is "Band every boy, tag every boy, stick

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[9] Moreover, even if all these troops would do so, the BSA plays with semantics when it states that it would be impossible for Mr. Dale to "remain a member without holding a leadership position," because there are "no roles for adult 'members' beyond serving as volunteer leaders for youth." Br. at 14 n.5. In Scouting, every adult is referred to as a Scouter or "Scout Leader," but there are many adults who maintain an affiliation with the Boy Scouts through renewing an annual membership (as Roland Pool would have), but do not have an affiliation with *any* Troop. J.A. at 373.

[10] *See also, e.g.*, AL 458 (BS Hbk. 5th) (uniform "shows that you belong to the biggest boys' organization in the world"). The BSA is the largest youth organization in America. AL 517 (ICC Guide). The Boy Scout Handbook is "the country's best seller, with the exception of the Bible," AL 444 (BS Hbk. 4th), with more than 33 million copies printed since 1911. AL 508 (BS Hbk. 10th). Since 1911, *Boy's Life* has placed "more than 16 billion magazines in circulation," AL 604 (Facts About Scouting); more than 2 million boys receive it. *See* AL 508 (BS Hbk. 10th).

every boy." AL 609 (1997 Join Scouting Night Council Guidebook). Similarly, the Boy Scouts inform adults that "[i]f you have an interest, we have a volunteer job for you." AL 549 (BSA NCAC, *Character Counts*). Because the Boy Scouts actively seek to encourage membership, they engage in no routine screening of youth applicants, AL 10 (Jones); AL 302-04 (Kay), and almost no routine screening of adult applicants. AL 9 (Jones); AL 206-301 (Kay); AL 261 (former Regional Scout Executive Rudy Flythe). Despite having over 93,000,000 members in its history, AL 603 (Facts About Scouting (1996)), there are only 7,000 people whom the BSA has ever rejected or expelled from Scouting *for any reason*. AL 617 ¶ 10, 611 ¶¶ 3, 5 (affidavits by BSA counsel).

The BSA's 1996 Annual Report proudly proclaims that "more than ever, Scouting is an integral part of the fabric of America." AL 605. Its charter requires it to report to Congress each year on the status of the organization. J.A. 318. In fact, the BSA personally delivers its annual "Report to the Nation" to the President as well. AL 105-06 (Carroll). Each President has "taken an active part in the work of the movement" and has "served as Honorary [BSA] President during his term in office." J.A. 46; AL 190-92 (Leet).

The Boy Scouts are required by their charter to operate through other agencies or organizations. J.A. 315. Some of these agencies or organizations are public, some are private; some are secular; some are religious. AL 622-23 (Organizations That Use Scouting (1989 prtg.)) BSA's 1990 Annual Report noted that some three times as many registered youth were in units sponsored by public schools than in units sponsored by any other organization. AL 571. Other sponsors include fire departments and law enforcement groups as well as the military and governmental agencies. *Id.*; AL 622-23 (Organizations That Use Scouting); AL 195-96 (Leet).

Due to their charter and mission, and by choice, the Boy Scouts operate as one of the most public of organizations imaginable. Since 1981, every Boy Scout national jamboree has taken place (on privileged terms) at a military base—Fort A.P. Hill. AL 54 (Press). Congress has authorized the military to provide free transportation to Boy Scout jamborees and to loan equipment for free for the Boy Scouts' use. 10 U.S.C. §§ 2544, 7541. The Navy also has regulations on how it can assist the Boy Scouts' program. OPNAV Instruction 5760.5b; *see also, e.g.*, 13 U.S.C. § 641; 10 U.S.C. §§ 4682, 9682 (statutes authorizing the military to sell obsolete or excess material to the BSA); N.J. Rev. Stat. § 23:2-3 (authorizing government agencies to stock bodies of water with fish for use by Boy Scouts). The Boy Scouts have long had ceremonial roles in events like the National Tree Lighting Ceremony, the National Easter Egg Hunt at the White House, and presidential inaugural activities. The Boy Scouts actively recruit on privileged terms in public schools. *See, e.g.*, AL 609.

The Boy Scouts do not decline this public exposure, access and largesse, on the basis that they are a "distinctly private organization." AL 199-202 (Leet). For those purposes, the Boy Scouts are "an integral part of the fabric of America." AL 605 (1996 Annual Report).

In any event, the BSA cannot invoke a Constitutional right of intimate association to sustain a *national* policy that *prevents* over six million members from deciding with whom they wish to associate. In *Roberts* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), organizations failed to make out an intimate association claim even though their members all registered with a local club *knowing* that the club was supposed to be all male. *See Rotary Club*, 481 U.S. at 546-47; *Roberts*, 468 U.S. at 619-22. But the BSA cannot contend that people join Scouting in order to associate with heterosexuals; it does not notify volunteer applicants that it excludes homosexuals. Rejecting the BSA's argument, would, in fact, protect the right of intimate association for troops, who would then decide with whom they want to associate.

III. THESE FACTS DO NOT PRESENT ANY REASON TO RECONSIDER THE *ROBERTS* TRILOGY.

If the Boy Scouts' members actually had come together to express a view concerning homosexuality, it would have been easy for the BSA to establish that point. The BSA could point to the many editions of the *Boy Scout Handbook*, the *Scoutmaster Handbook*, the training manuals or innumerable other documents to support it. To support the propositions that the Boy Scouts are "absolutely non-sectarian," that Scouts are expected to "[r]espect and defend the rights of all people," or that Scouts are expected to follow the guidance of their parents and religious leaders on matters of morality, the BSA could call literally millions of witnesses. For purposes of justifying conduct that has been held to violate the LAD, however, the BSA is unable to cite anything coherent, except a desire *in this instance only* to be permitted to violate its well-expressed principles by picking and choosing among the views of religious groups.

Even if for some reason the teachings of the *Roberts* trilogy were wrong, this case would not be the appropriate opportunity to redefine those teachings. Under any standard, there has to be at least *bona fides*. Courts are entitled to decide whether an organization's members have joined together for the purpose of making a statement concerning homosexuality, *Roberts*, 468 U.S. at 626-27; whether the law "imposes any serious burdens," *id.* at 627, on such an expressive association; or whether the organization's desire to discriminate overcomes the State's compelling interest in eradicating discrimination. *Id.* at 623. Otherwise, organizations would be above the law; any organization could discriminate so long as its leader-

ship declared in litigation that it really did want to discriminate, irrespective of whether that desire had anything to do with the expressive purposes of its members.

The BSA's case fails not because the Court imposes any difficult burden, but because its defense contorts a national organization designed to be part of the fabric of America into one that rends that fabric. Every citizen of New Jersey or of the District of Columbia has school teachers that are chosen without regard to sexual orientation, as well as day care workers and the staff at the toy store. Many go to churches and temples where they are told that it is wrong to discriminate against people based upon their sexual orientation, perhaps by religious leaders who are themselves homosexual. Schools that cannot discriminate do not sponsor Boy Scout troops so as to promote discrimination. And the faithful of churches or temples that decry such discrimination do not join troops for the purpose of violating their beliefs.

"Great cases" are prone to "make bad law." *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting). Here, the BSA seeks to make the case "great" in order to make bad law. The Supreme Court of New Jersey unanimously and properly recognized that if laws against discrimination mean anything, they mean that parties cannot declare themselves exempt by say-so.

CONCLUSION

For these reasons, the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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